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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 335

IRENE B. WHETSTONE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION OF IRENE B. WHETSTONE FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT COVERING COMPANION CASES, PRESENTING PRACTICALLY IDENTICAL ISSUES, NOW IN THAT COURT.

IRENE B. WHETSTONE
Pro Se
9820 Vanderpoel Ave.
Chicago 43, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, sometimes referred to herein as appellant, or defendant, in relating proceedings in the courts below in the two companion cases herein which were consolidated for trial in the United States District Court, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, to consider and pass upon substantial jurisdictional issues which your petitioner properly raised by motion in said Court of Appeals at the time of docketing her appeals in the said companion cases; and which jurisdictional issues the said Court of Appeals refused to pass upon. These jurisdictional issues are determinable from facts appearing on the face of the record in both cases.

OPINIONS BELOW.

To date, no opinions of law have been reported by the lower courts.

JURISDICTION.

The grounds for jurisdiction are:

Both of the courts below having proceeded to enter orders adversely affecting the rights of your petitioner, *after refusing to pass upon substantial jurisdictional issues* raised by your petitioner by proper motions, in the respective courts, which challenged the jurisdiction of said courts to enter such orders, petitioner seeks the intervention of this Court, because, where the record discloses on its face that the lower courts were without jurisdiction, this Court will notice the defect; and while the lower courts lacked jurisdiction, this Court has jurisdiction, *not of the merits,* but merely for the purpose of arresting the errors of the lower courts.*

On August 2, 1956, the United States Court of Appeals for the Seventh Circuit entered an order (Appendix, pp. 9a and 10a) (R. 11703, p. 153; 11704, p. 130) sustaining the appellee's motion of July 13, 1956, and dismissing appellant's (your petitioner's) appeals, in the two cases referred to herein, on the ground that appellant had failed to make preparation for a hearing on the merits in these actions in which it is clearly manifest that the records were not subject to review on the merits. This Court's determination as to the finality and validity of the judgments, from which the appeals were taken to the said Court of Appeals, will be determinative as to the jurisdictional authority of the latter court to enter the order of dismissal.

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* **United States v. Corrick, 298 U.S. 435, 440.**

The judgments, the finality and validity of which your petitioner seeks a determination, are those of the United States District Court for the Northern District of Illinois, Eastern Division, entered by that court December 7, 1955 (Appendix, pp. 1a and 6a) (R. 11703, p. 96; 11704, p. 71), which judgments in each case adjudicated only one of the claims in the multiple-claims action to which it referred, while failing to comply with the terms of Rule 54(b) Federal Rules of Civil Procedure which govern the entry of judgments in multiple-claims cases.

Pertinent to the questions raised as to the finality and validity of the judgments appealed from are the District court's orders (Appendix, pp. 4a, 5a and 7a) (R. 11703, p. 91; 11704, p. 33) which attempted the disposition of your petitioner's compulsory counterclaims which are still pending in the District court.

Also pertinent to the validity of the judgments appealed from are the District court's orders (Appendix, pp. 5a, 6a and 7a) (R. 11703, p. 6, docket entry 10-31-55; 11704, p. 33) which orders dismissed the defendant's affirmative defenses before she was given opportunity to present them.

Further material pertinent to the validity of the judgments appealed from are the averments contained in paragraph 14 of defendant's compulsory counterclaim for overpayment of the 1944 tax, and paragraph 12 of defendant's compulsory counterclaim for overpayment of the 1946 tax (Appendix, pp. 10a and 11a) (R. 11703, p. 67; 11704, p. 22)

The judgments in the cases herein were accompanied by "Proposed" Findings of Fact and Conclusions of Law which for all practical purposes are the same, except for dates and amounts; therefore, only one copy appears in the Appendix (Appendix, pp. 2a, 3a and 4a) (R. 11703, pp. 93-95; 11704, pp. 68-70). In each case judgment was en-

tered by said District court after it had disclaimed jurisdiction of the subject matter of the action, and after it had denied defendant, your petitioner, due process of law. Therefore, the findings and conclusions were made by a court lacking jurisdiction, and they are appended hereto only for the purpose of conforming to the rules of this Court. Petitioner does not seek a review here on the merits because at no time was she permitted to defend.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 and 1254 (1).

QUESTIONS PRESENTED.

Note: For the sake of clarity, the following questions are written as though pertaining to a single cause, but the issues in the two cases, for which a writ of certiorari is desired, are identical, and questions which pertain to one cause pertain to both.

(1) In the United States Court of Appeals where jurisdiction is limited and defined by statute, *may jurisdiction be presumed to exist where matter essential to the exercise of jurisdiction, pursuant to the terms of said statute, does not appear upon the face of the record?*

(2) Where in this multiple-claims action, two separate orders were entered, each order attempting the disposition of different claims or groups of claims, and no order was entered in said action adjudicating all of the claims in the action in which the two separate orders were entered, and neither of said orders included an "express determination" pursuant to the terms of Rule 54(b) Federal Rules of Civil Procedure, which govern the entry of *final* judgments in multiple-claims cases, were either of said orders "final" orders subject to review on the merits?

(3) Where the United States District Court entered an order dismissing defendant's compulsory counterclaim,

on the ground that it lacked jurisdiction of the subject matter, and in doing so accepted as true the averment contained in said compulsory counterclaim that it (the compulsory counterclaim) "presents the same subject matter as that which forms the basis for the government's complaint herein" (a) may the said District court thereafter proceed as though having jurisdiction of the subject matter of the government's complaint, and is the judgment rendered as a result of said procedure a valid judgment? And, where the facts stated are clearly manifest upon the face of the record (b) is the said judgment subject to review on the merits?

(4) Where in the same action the United States District Court refused to consider the questions riased by defendant as to the legality of the tax which the government seeks to collect, and also denied its jurisdiction of the subject matter of defendant's compulsory counterclaim which seeks to recover a portion of the same tax paid by defendant under protest on the ground of its illegality, thus *in the same action refusing to pass upon the legality of the tax both before and after its payment*— denying defendant "all remedy at law", (a) did the said District court thereafter in the same action have jurisdictional authority to render a judgment against defendant? And, where the facts stated above are clearly manifest on the face of the record (b) was the said judgment subject to review on the merits?

(5) Where it is clearly manifest upon the face of the record that the United States Court of Appeals for the Seventh Circuit lacked jurisdiction of this action, did it have jurisdictional authority to require appellant to proceed to a hearing on the merits?

(6) Where it is clearly manifest upon the face of the record that the United States Court of Appeals lacked

jurisdiction of the appeal, did it have jurisdictional authority to dismiss the appeal on any other ground?

(7) Where Rule 13(i) Federal Rules of Civil Procedure *makes the ordering of a separate trial and the exercise of jurisdiction prerequisites to the entry of a separate judgment on a counterclaim*, (a) was the separate order entered by the United States District Court in the case herein, *without ordering or permitting a trial or hearing*, and striking or dismissing the defendant's compulsory counterclaim for lack of jurisdiction of the subject matter a valid order? And, (b) was it subject to review on the merits?

(8) Where the order of the United States District Court, striking defendant's counterclaim, holds that the court lacks jurisdiction of the subject matter of the said counterclaim, and the District court, thereafter, in the same order passed upon a defense going to the merits of the said counterclaim, is such a self-contradictory order a valid order?

(9) Where at the one and only trial ever had in these actions, the United States District Court, at the first reference to the complaint, arbitrarily excluded the complaint and the other pleadings from its consideration, and refused to permit reference to them during the trial, were such pleadings subject to review by the United States Court of Appeals?

(10) Where at the one and only trial ever had in these actions, the United States District Court excluded all reference to the complaint and other pleadings; and, on the plaintiff's "speaking" motion it dismissed the defendant's (your petitioner's) affirmative defenses, including a compulsory counterclaim; limited the issues to two factual, non-controversial matters not placed in issue

by the pleadings, but which were arbitrarily selected by the District court; refused to permit the defendant to place her objections on the record; excused her witness before she had opportunity to adduce testimony vital to her defense; denied her the right to testify in her own behalf as to why she did not owe the tax alleged to be owing by her, an allegation which she had denied in her direct answer; and then closed the proceeding without permitting the defendant to sum up such evidence as she was permitted to adduce, or to plead the law, was such proceeding "a trial on the merits", and did the transcript of such proceedings constitute a record subject to review on the merits?

(11) Where it is obvious that there had been no "trial on the merits" in the District court and no record subject to review by the United States Court of Appeals, and that the appeals were docketed for the purpose only of obtaining a determination of jurisdictional issues apparent upon the face of the record, and there were sworn statements on file in the Court of Appeals setting forth facts which remain undisputed to support the assertion that there had been no trial on the merits in the District court, (a) could appellant be required to print the costly record for the purpose of a hearing on the merits in the Court of Appeals? And, where the cost of printing would represent a substantial proportion of the amount in issue, (b) would not such a demand for printing be the equivalent of a denial of judicial relief by making prohibitive the conditions upon which it is offered?

(12) Where the appellant was denied "due process of law" in the court of first instance and her right of appeal therefore arises under the Constitution, may a rule of the United States Court of Appeals, applicable at its dis-

cretion, be invoked to annul the appellant's constitutional right?

(13) Where it is obvious upon the face of the record that *matter essential to the exercise of jurisdiction by the United States Court of Appeals is lacking,* as where in this multiple-claims action the judgment which fails to adjudicate all of the claims in said action is not accompanied by an "express determination" as required by Rule 54(b) Federal Rules of Civil Procedure, *and where jurisdiction is a prerequisite to the exercise of discretionary power,* may the United States Court of Appeals, under such circumstances, without passing upon the jurisdictional issue, exercise its discretionary power in a manner to overrule with finality your petitioner's right to judicial relief?

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED HEREIN

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENTS.

(First Ten Amendments passed by Congress September 25, 1789. Ratified by three-fourths of the States December 15, 1791.)

Article V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process*

of law; nor shall private property be taken for public use without just compensation. (emphasis added)

STATUTES—FROM TITLE 28, UNITED STATES CODE (As Amended, 1948), 28 U.S.C.A. Chapter 83—Courts of Appeals, Section 1291.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

FEDERAL RULES OF CIVIL PROCEDURE—

(Enacted into law by Act of June 19, 1934, chapter 651 (48 Stat. 1064), Title 28, U.S.C. following Sec. 723(b), 723(c). Amended Rules effective March 19, 1948).

Rule 54(b) F.R.C.P.

(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Rule 13(i) F.R.C.P.

(i) *Separate Trials; Separate Judgment.* If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or crossclaim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

Rule 75(j) F.R.C.P.

(j) *Record for Preliminary Hearing in the Appellate Court.* If, prior to the time the complete record on appeal is settled and certified as herein provided, a party desires to docket the appeal in order to make in the appellate court a motion for dismissal, for a stay pending appeal, for additional security on the bond on appeal or on the supersedeas bond, or for any intermediate order, the clerk of the district court at his request shall certify and transmit to the appellate court a copy of such portion of the record or proceedings below as is needed for that purpose.

Rules Of The United States Court Of Appeals For The Seventh Circuit (effective July 1, 1952).

Rule 13(b) *Disposition of Appeals Without Hearing on Merits.*

(b) Whenever it appears that there is a substantial jurisdictional question in a cause pending on appeal, such question may be raised by either party by motion, filed in accordance with Rule 19, to determine the issues as to jurisdiction in advance of hearing on the merits. Such motion shall be made as soon as possible, and preferably before printing of the record on appeal, and when such motion is filed, all further proceedings shall be held in obeyance without further order until due disposition thereof has been made.

(Rule 15(f) of Revised Rules, effective July 1, 1956)

SUMMARY AND STATEMENT OF THE CASES.

Note: The United States District Court for the Northern District of Illinois, Eastern Division, at the one and only trial had in these actions (October 31, 1955), *excluded all reference to the pleadings, including the complaint* (Transcript of Proceedings, p. 99). The pleadings are listed in the following paragraphs for the purpose only of showing what was excluded by the District court from its consideration.

The two cases for which this petition seeks a writ of certiorari were instituted by the United States of America, respondent, hereinafter sometimes referred to as the government, and were shown as arising "under the laws of the United States providing for Internal Revenue." (R. 11703 p. 10; 11704 p. 6)

The first complaint was filed June 29, 1951 (R. 11703 pp. 10-12), and it alleged that defendant owed a balance of the 1944 Federal income tax; the second complaint filed July 13, 1953 (R. 11704 pp. 6-7) alleged that defendant owed a balance of the 1946 Federal income tax.

To each of the said complaints defendant served and filed a proper and timely answer, the first, by order of the District court, filed October 8, 1951 (R. 11703 pp. 13-51), and the second filed July 28, 1953 (R. 11704 pp. 9-30). In her direct answers she denied the allegation that she owed a balance of the tax as alleged, and she set up by way of affirmative defenses reasons why she did not owe the said taxes—charging in each case that the tax was illegal, having been levied to provide money for the support and aid of foreign governments and for other unauthorized purposes. In each case defendant included

as a part of her affirmative defenses a compulsory counterclaim* (R. 11703 pp. 21-32; 11704 pp. 19-30) seeking recovery of an overpayment which appeared as such on her income tax return for the year involved.

To the counterclaims (filed by your petitioner with her answers to the government's complaints instituting the two cases herein) the government replied (to the first) on December 6, 1951 (R. 11703 p. 54) and (to the second) on August 19, 1953 (R. 11704 p. 31) setting up the defenses: (1) that the District court lacked jurisdiction of the subject matter of the said counterclaims; (2) that the said counterclaims failed to state a claim on which relief can be granted; and (3) a general denial of the allegations contained in the said counterclaims.

In the case of the action involving the 1944 tax, on July 9, 1953, the government filed an amended and supplemental reply (R. 11703 pp. 55-57) to defendant's counterclaim, which reply contained similarly worded defenses (1), (2) and (3), as presented in its original reply to said counterclaim, and by way of supplement, it included a counterclaim (R. 11703 pp. 56-57) to defendant's permissive counterclaim for the 1946 overpayment. Defendant also, by leave of court, filed an amended counterclaim July 14, 1953 (R. 11703 pp. 64-77).

In the case of the action for the 1944 tax, the government on September 8, 1953, filed a defensive motion (R. 11703 p. 59) seeking a preliminary determination of its defenses (1) and (2) contained in its reply to defendant's counterclaim.

*** Note: In the case of your petitioner's answer to the government's charge that she owed a balance of the 1944 income tax, defendant also included three permissive counterclaims seeking recovery of taxes paid by defendant under protest for 1943, 1945 and 1946 tax years.**

With the District court's permission, defendant also filed on July 28, 1953, a reply (R. 11703 pp. 79-89) to the government's counterclaim for an alleged balance of the 1946 Federal income tax, making similar denials and setting forth similar defenses to those presented in her answer to the government's original complaint. The District court never took action on these defenses to the government's counterclaim for the alleged balance of the 1946 tax, and the government's counterclaim remains pending in the District court.*

In the action involving the 1944 tax, the District court, *without ordering or permitting a separate trial on the government's defenses to defendant's counterclaim,* entered an order dated October 27, 1954 (Appendix pp. 4a and 5a) (R. 11703 p. 91) granting the government's defensive motion and striking defendant's amended counterclaim (R. 11703 pp. 64-77) (1) for lack of jurisdiction of the subject matter, and (2) for failure to state a claim on which relief can be granted.

In each case herein, the compusory counterclaims (R. 11703 pp. 64-77; 11704 pp. 19-30) filed by defendant with her answer to the government's complaint (and as amended in the 1944 action) *contained the averment of fact that the counterclaim "presents the same subject matter as that which forms the basis for the government's complaint."* (Appendix p. 10a and p. 11a) (R. 11703 p. 67, paragraph 14; R. 11704 p. 22, paragraph 12)

Both of these causes for which a petition for writ of certiorari is sought herein were set for trial in the United States District Court for the Northern District

* Note: On July 13, 1953, the government filed a complaint (R. 11704 p. 6) for the alleged balance of the 1946 tax, which independent action is one of the cases for which your petitioner seeks a writ of certiorari herein.

of Illinois, Eastern Division, October 31, 1955. At this trial, on motion by the government, *the two cases herein were consolidated, for trial only, to proceed under the District court's docket number 51 C 1017.* (See Transcript of Proceedings page 3.) See also District court's order of October 31, 1955 (Appendix p. 7a) (R. 11703 p. 6 docket entry 10-31-55 and R. 11704 p. 33).

As shown by the foregoing paragraphs, *each case when called for trial* October 31, 1955, *constituted a multiple-claims action.*

At the trial October 31, 1955, as soon as the government's testimony was closed, and before defendant opened her defense, the government's counsel presented, *and the court sustained, a "speaking" motion to strike defendant's affirmative defenses in both actions, on the unfounded, unpleaded and unproven assertion that the points had been already "litigated"* (Transcript of Proceedings pp. 69-70). At the same time, the government's counsel presented, *and the court sustained, a "speaking" motion to strike defendant's compulsory counterclaim for the overpayment of the 1946 tax, on the ground that the court lacked jurisdiction of the subject matter* (Transcript of Proceedings pp. 69-70). Defendant was not permitted to make objections (Transcript of Proceedings pp. 70-74) and her affirmative defenses, in both actions, and her compulsory counterclaim for the 1946 overpayment were dismissed by the District court's orders of October 31, 1955 (Appendix pp. 5a, 6a and 7a) (R. 11703 p. 6 docket entry 10-31-55; R. 11704 p. 33).

Irrespective of the defenses established by defendant's direct denial, included in her respective answers, *the District court proceeded to limit the issues which it would consider,* by its statement:

> "If you did not make these returns, take the stand or show it. If you did make them and then made some payments, produce the evidence, *and that is the only kind of evidence* I am going to listen to." (Transcript of Proceedings p. 73). (Emphasis added)

At the trial, October 31, 1955, *on the first attempt to refer to the government's complaint, the District court excluded all reference to the complaint and the pleadings by its statement:*

> "The facts of the complaint have all been settled. I have explained very carefully to you a number of times that the issue is payment or nonpayment or whether or not the tax is due. *We have settled the pleadings a long time ago.*" (Transcript of Proceedings p. 99). (Emphasis added)

When defendant questioned the witness under examination at that time as to whether there had ever been a hearing on any of the issues raised by the pleadings in the case, the government's counsel objected, without giving a reason, and the court sustained the objection, even after defendant had called the court's attention to the importance of the question in view of the court's statement that the pleadings had all been settled (Transcript of Proceedings p. 99). Immediately thereafter the court excused defendant's witness without permitting her to adduce testimony vital to her defense (Transcript of Proceedings p. 105). *Defendant was not allowed to sum up such evidence as she had been permitted to present, to plead the law, or place her objections on the record* (Transcript of Proceedings p. 107), *and she was denied the right to testify in her own behalf as to why she did not owe the tax* (Transcript of Proceedings pp. 105-107).

> Note: The foregoing facts are not submitted as errors of the trial court but *are presented to indicate what matter was excluded from the District court's*

consideration and thus to support your petitioner's assertion that there was no trial on the merits in the District court and no record for review by the United States Court of Appeals.

On November 18, 1955, defendant served and filed a motion in each case (R. 11703 p. 6, docket entry 11-18-55; R. 11704 pp. 35-66) under authority of Rule 12 (h) (2) Federal Rules of Civil Procedure, challenging the jurisdiction of the District court to enter the judgments against her in the respective cases, proposed copies of which had been prepared and served upon defendant by the government's counsel. On November 21, 1955, when defendant attempted to present her motion in court, she was denied that right, but the court entered an order taking the motion under advisement (R. 11703 p. 6, docket entry 11-21-55; R. 11704 p. 3, docket entry 11-21-55). Defendant asked for a hearing on the motion but hearing was denied. A judgment, together with proposed findings of fact and conclusions of law, was entered in each case as the District court's final action, December 7, 1955 (Appendix p. 1a and p. 6a) (R. 11703 p. 96; 11704 p. 71).

In each case *the said judgment adjudicated only the government's claim and it was not accompanied by an express determination that there was no just reason for delaying judgment until the balance of the claims were adjudicated.*

Your petitioner, after properly filing Notices of Appeals, February 3, 1956 (R. 11703 p. 97; 11704 p. 73) *docketed an appeal in the United States Court of Appeals for the Seventh Circuit March 12, 1956* (R. 11703 p. 117; 11704 p. 91) *on a short record, under authority of Rule 75(j) Federal Rules of Civil Procedure and Rule 13(b) of the said Court of Appeals.* Simultaneously with the

docketing of the short record, your petitioner filed a motion with the Clerk of the United States Court of Appeals for the Seventh Circuit (R. 11703 pp. 125-135; 11704 pp. 101-112) *asking for a preliminary determination of substantial jurisdictional questions pertaining to the finality of the judgments appealed from, and the jurisdiction of the said District court to enter them* (Points 1 and 2 of the Statement of Points Relied upon on Appeal (R. 11703 pp. 101-115; 11704 pp. 77-89). She accompanied said motion with an affidavit (R. 11703 pp. 133-135; 11704 pp. 109-111) asserting under oath that there had never been a trial on the merits in the District court.

The government answered appellant's motion March 29, 1956, by a counter-motion asking the said Court of Appeals to deny your petitioner's motion for a preliminary determination of the jurisdictional issues—in other words—to desist from passing upon the questions raised as to the jurisdiction of that court to review the record on the merits. The United States Court of Appeals for the Seventh Circuit sustained the government's motion on April 10, 1956 (Appendix p. 8a) (R. 11703 p. 124; 11704 p. 100) and thereafter denied appellant's motion for reconsideration (Appendix p. 9a) (R. 11703 p. 137; 11704 p. 113).

The cases were not placed on the calendar of cases due for call by the United States Court of Appeals for the Seventh Circuit. For reasons clearly shown by motions duly filed in the said Court of Appeals (R. 11703 pp. 142-152; 11704 pp. 101-112) your petitioner did not consider that her appeals were before the said Court of Appeals on the merits, or that the records were subject to review because there had never been a trial on the merits in the District court and there was no record on the merits to review. She waited for a listing of the case for trial,

or for an order to show cause why she should not proceed in the action so that she would have opportunity to present her position.

The government, on July 13, 1956, filed a motion (R. 11703 p. 138; 11704 p. 114) with the Clerk of the United States Court of Appeals for the Seventh Circuit seeking to have these appeals dismissed for alleged failure of your petitioner to comply with a rule of that court requiring the printing of the record.

On August 2, 1956, the United States Court of Appeals for the Seventh Circuit entered an order (Appendix pp. 9a and 10a) (R. 11703 p. 153; 11704 p. 130) sustaining the government's motion and dismissing your petitioner's appeals in the two cases herein.

SUMMARY OF THE REASONS RELIED UPON FOR THE GRANT OF A WRIT OF CERTIORARI.

I.

Federal Rules have been established for the proper conduct of civil actions in our Federal courts. Litigants have a right to expect the courts to respect and abide by them. Where the lower courts ignore the rules altogether so far as their own practices are concerned, but hold a litigant to their strict observance the situation is untenable. Where there was an outright showing of disregard by the United States District Court for the Northern District of Illinois, Eastern Division, for the rules which this Court established for its observance, and there was a sanctioning of such disregard by the United States Court of Appeals for the Seventh Circuit, there is need for the exercise of this Court's supervisory power.

II.

Where the lower courts, while *expressing no opinions, act in complete disregard of controlling decisions rendered by this Court,* and by other courts of appeals, as in the present instance, and *where they make no attempt to distinguish from such decisions, or to justify their acts or decrees which are in contravention thereof,* as in the present instance, the purpose for which the Supreme Court of the United States was established is completely undermined, its decisions cease to carry weight. If they are not respected in one instance, they could be disregarded in every intance, and our Federal judicial system would soon deteriorate into no system, with each Federal court issuing decrees to suit its prejudices or its convenience. *It is of national concern* that our Federal system of jurisprudence be maintained and that respect for it be preserved. This can be assured only where this Court intervenes and overrules arbitrary decrees of the courts below when its decisions are disregarded, as in the present instance.

III.

"Due process of law" is a constitutional right, and where in an action, brought in a Federal court by the Federal government, against a citizen of the United States, both the court of original instance and the appellate court fail to accord the defendant the right of "due process" denying the citizen all remedy at law, there is complete departure from the acceptable course of judicial proceedings and the Supreme Court of the United States, the Court of last resort, has a moral obligation to take cognizance of the case, in order to prevent our Federal judicial system from becoming "an instrument of wrong and oppression."

IV.

Where at the only trial ever held in the action, the United States District Court for the Northern District of Illinois excluded all reference to the complaint and other pleadings; and without a hearing, it dismissed the defendant's compulsory counterclaim; and on the plaintiff's "speaking motion", before defendant had opportunity to present her defense, it dismissed the defendant's affirmative defenses, which challenged the validity of the plaintiff's complaint; where it limited the evidence to which it would listen to non-controversial matters not placed in issue by the pleadings, but arbitrarily selected by the District court; where it refused to permit defendant to place her objections on the record; excused her witness before she had opportunity to adduce testimony vital to her defense; denied her the right to testify in her own behalf as to why she did not owe the tax alleged to be owing by her, a liability which she had denied in her direct answer; and then closed the proceeding without permitting the defendant to sum up such evidence as she had been permitted to adduce, or to plead the law;— the District court completely departed from the usual course of judicial proceedings; and, when the United States Court of Appeals for the Seventh Circuit sanctioned this departure from the usual course of judicial procedure, by indicating its intention to review such radical proceedings on the merits, and calling for the printing of a voluminous record, the situation calls for the exercise of this Court's supervisory power.

ARGUMENTS AMPLIFYING THE REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI.

I.

(1) In the two multiple-claims cases to which this petition relates, the Federal District court made no attempt to abide by the Federal Rules of Civil Procedure in entering orders attempting the disposition of separate claims. In the action involving the 1944 tax, the District court entered one order dated October 27, 1954 (Appendix pp. 4a and 5a) (R. 11703 p. 91) and a second order dated December 7, 1955 (Appendix p. 1a) (R. 11703 p. 96). In the action involving the 1946 tax, the District court entered an order October 31, 1955 (Appendix p. 7a) (R. 11704 p. 33) and another order dated December 7, 1955 (Appendix p. 6a) (R. 11704 p. 71). Each of these orders attempted the disposition of separate claims in the action in which it was entered. No order was entered in either of said actions adjudicating all of the claims in said action, and in no case were the aforesaid orders accompanied by an "express determination" as required by Rule 54(b) Federal Rules of Civil Procedure. Therefore, none of the said orders were "final" orders, because material essential to their finality was omitted.

(2) Inasmuch as the jurisdiction of the United States Court of Appeals is limited to "final" orders, and these orders lacked material essential to their finality, *material essential to the exercise of jurisdiction by the United States Court of Appeals for the Seventh Circuit did not appear upon the face of the record, and no presumption of jurisdiction on the part of the said Court of Appeals could be entertained.* (See *Galpin* v. *Page*, 18 Wall. 350, 371)

(3) The United States Court of Appeals for the Seventh Circuit disregarded the requirements of Rule 54(b) Federal Rules of Civil Procedure and indicated by its orders of April 10, 1956 (Appendix p. 8a) (R. 11703 p. 124; 11704 p. 100) its intention of proceeding to review on the merits the said orders which according to the terms of Rule 54(b) lacked the essential elements of "finality".

> "Without jurisdiction the court cannot proceed at all in any cause." *Ex parte McCardle*, 7 Wall. 506, 514.

(4) In each of the multiple-claims cases to which this petition relates, an order was entered by the District court attempting the disposition of defendant's counterclaims, including her compulsory counterclaims. (In the case of the action involving the 1944 tax see the District court's order of October 27, 1954 (Appendix pp. 4a and 5a) (R. 11703 p. 91); and, in the case of the action involving the 1946 tax see the District court's order of October 31, 1955 (Appendix p. 7a) (R. 11704 p. 33). Rule 13 (i) Federal Rules of Civil Procedure is definite in its requirements concerning the rendering of *separate* judgments on counterclaims wherein it states:

> "SEPARATE TRIALS — SEPARATE JUDGMENTS: *If the court orders separate trials*, as provided in Rule 42(b), judgment on a counterclaim or cross-claim *may be rendered* in accordance with the terms of Rule 54(b) *when the court has jurisdiction so to do* * * *." (Emphasis added)

(5) The *aforesaid separate orders entered by the District court attempted, without a trial or hearing,* to dis-

pose of defendant's counterclaims, including her compulsory counterclaims, *on the ground that the court lacked jurisdiction of the subject matter,* and they were in direct contravention of Rule 13(i). Nothing could lend finality to such an order. Controlling authorities hold that where jurisdiction exists under a statute its requirements must be complied with. *Webster* v. *Reid,* 11 How. 437.

(6) If the orders entered by the United States District Court in the respective actions referred to herein—in the one case, on October 27, 1954 (Appendix pp. 4a and 5a) (R. 11703 p. 91), and in the other case on October 31, 1955 (Appendix p. 7a) (R. 11704 p. 33), were to be considered as interlocutory orders, they were, according to the terms of Rule 54(b) Federal Rules of Civil Procedure, "subject to revision at any time before the entry of judgment adjudicating all the claims." The District court, in excluding all reference to the pleadings (Transcript of Proceedings p. 99) precluded the defendant from raising the issues involving the attempted disposition of her compulsory counterclaims, and thereby denied her the right to seek revision of the District court's orders dismissing them—a right afforded her by Rule 54(b).

(7) Rule 75(j) of the Federal Rules of Civil Procedure afforded defendant the privilege of docketing her appeal in the United States Court of Appeals for the Seventh Circuit on a short record for the purpose of obtaining a determination as to the finality of the judgment appealed from and the jurisdiction of the District court to enter it. *Where it was apparent that matter essential for the exercise of jurisdiction by the said Court of Appeals did not appear upon the face of the record,* and this fact was clearly presented to the said court in motions

(R. 11703 pp. 125-135; 11704 pp. 101-112) filed with the clerk of that court at the time of docketing the said record, *it would appear that the United States Court of Appeals for the Seventh Circuit was without the jurisdiction requisite for the exercise of discretionary power which it employed in denying your petitioner's motion for a determination of the jurisdictional issue* and it should have complied with the terms of Rule 75(j) Federal Rules of Civil Procedure.

(8) The orders of the United States Court of Appeals for the Seventh Circuit, (Appendix p. 8a) (R. 11703 p. 124; 11704 p. 100) denying defendant's motion for determination of its own jurisdiction, were not an affirmance of its jurisdiction but a refusal to determine its jurisdiction, and since there may be no presumption of jurisdiction, and jurisdiction is a prerequisite to the exercise of discretionary power, any act thereafter, by the United States Court of Appeals for the Seventh Circuit, exercising discretionary power in the matter of overruling appellant's right to judicial relief, was beyond that Court's jurisdiction.

II.

(9) The United States Court of Appeals for the Seventh Circuit, in denying defendant-appellant's motions for a determination of the jurisdictional issues, which she raised at the time of docketing her appeals, refused to make such determination in advance of its assuming jurisdictional authority and this action was in complete disregard of fundamental principles expressed by controlling authorities:

> "Where special powers conferred are exercised in a special manner, not according to the course of common law * * * *no presumption of jurisdiction will at-*

tend the judgment of the court. The facts essential to the exercise of special jurisdiction must appear in such case upon the record." (Emphasis added)

Galpin v. *Page,* 18 Wall. 350, 371.
See also: *Parker* v. *Ormsby,* 141 U.S. 81, 83.

(10) Where the Court of Appeals jurisdiction is limited to "final" orders, and in multiple-claims actions orders are final only when made pursuant to the terms of Rule 54(b) Federal Rules of Civil Procedure,—in the multiple-claims actions herein, in which none of the separate orders attempting the disposition of different claims in the respective actions included an "express determination" in compliance with the terms of that rule, *the facts essential to the exercise of jurisdiction by the Court of Appeals did not appear upon the record.* It could not *assume* jurisdiction *and in doing so, it transgressed the sound principles laid down by this Court in the foregoing decisions.*

(11) In refusing to make the jurisdictional determination requested by appellant, it also transgressed other controlling authorities, including some of its own current decisions. It has been repeatedly held by these authorities that—

"On every writ of error or appeal the first and fundamental question is that of jurisdiction; first of the appellate court and then of the court from which the record comes, and the appellate court is bound to ask and answer such question for itself, even when not otherwise suggested."

Mansfield C. and L.M.R. Co. v. *Swan,* 111 U.S. 379, 382.
Mitchell v. *Maurer,* 293 U.S. 237, 244.
Giles v. *Teasley,* 193 U.S. 146, 162.
Green v. *Green,* 218 F. 2d 130, 136 (7 Cir.).
Jarecki v. *Whetstone,* 192 F. 2d 121, 124 (7 Cir.).

Nat'l Nut Co. of Calif. v. *Kelling Nut Co.*, 134 F. 2d 532, 533 (7 Cir.).
McNutt v. *General Motors Acceptance Corp.*, 298 U.S. 178, 184.
Flegenheimer v. *General Mills, Inc.*, 191 F. 2d 237, 238.
Birmingham Post Co. v. *Brown*, 217 F. 2d 127, 130.
Mattingly v. *Northwestern Va. R. Co.*, 158 U.S. 53, 56.
Parker v. *Ormsby*, 141 U.S. 81, 83.
Delaware L. & W. R. Co. v. *Scales*, 18 F. 2d 73, 74.

(12) The need in these cases for appellate determination of the jurisdictional issue was emphasized by the fact that defendant-appellant's motions (R. 11704 pp. 35-66) filed November 18, 1955, in the United States District Court for the Northern District of Illinois, under authority of Rule 12 (h) (2) Federal Rules of Civil Procedure, challenged the jurisdiction of the latter court, and although defendant was not permitted to present her motions orally in court on November 21, 1955, an order was entered by the said District court taking the motions under advisement. Authorities hold—

> "Questions of jurisdiction raised by defendant's motion to dismiss made at close of case, though not argued, must be considered *sua sponte* by Circuit Court of Appeals."
>
> *Delaware L. & W. R. Co.* v. *Scales*, 18 F. 2d 73, 74.

(13) With respect to a determination of the jurisdictional issues presented by defendant-appellant, the United States Court of Appeals for the Seventh Circuit had presented to it controlling authorities to support appellant's position that the judgment appealed from was

not a final order and that the District court lacked jurisdiction to enter it. Pertaining to the finality of the order, the United States Court of Appeals for the Seventh Circuit itself declared, in the case of *Mackey* v. *Sears, Roebuck & Co.*, 218 F. 2d 295, 298:

> "In a multiple-claims case, *the judgment which finally adjudicates all the claims is the only judgment having finality, unless* the District court, in the exercise of its discretion, expressly determines that there is no just reason for delay with respect to the entry of a final judgment on a particular claim in the action and accordingly expressly directs the entry of a final judgment adjudicating that claim." (Emphasis added)

See also:

Winsor v. *Daumit*, 179 F. 2d 475, 476 (7 Cir.).
Etten v. *Kaufman, et al.*, 179 F. 2d 302, 303 (3 Cir.)
Dist. 65 Distributive Processing and Office Workers Union of N. Y. and N. J. v. *McKogue*, 216 F. 2d 153, 155 (3 Cir.).
McDonald v. *Penn. R. Co.*, 210 F. 2d 524, 531 (3 Cir.).
Tobin Packing Co. v. *North Amer. Car Corp.*, 188 F. 2d 158.

(14) With respect to the question raised by defendant-appellant as to the jurisdiction of the United States District Court, for the Northern District of Illinois, Eastern Division, to enter the judgment appealed from, the facts and the law support appellant's position. The facts appeared upon the face of the record and the law was presented to the Court of Appeals in briefs supporting her motions for a determination of the jurisdictional issues. In each of the causes, referred to herein, defendant filed a compulsory counterclaim which contained the averment:

This counterclaim "presents the same subject matter as that which forms the basis for the government's complaint herein."

(Appendix pp. 10a, 11a) and (R. 11703 p. 67, para. 14; R. 11704 p. 22, para. 12)

(15) The District court by its orders of October 27, 1954 (R. 11703 p. 91) and October 31, 1955 (R. 11704 p. 33) respectively, dismissed the counterclaims in the said actions for lack of jurisdiction of the subject matter.*

"In determining whether a motion to dismiss a complaint was properly granted, the facts alleged in the complaint must be taken as true."

United States v. *Yellow Cab Co.*, 332 U.S. 218, 224 and Hd. Note 1.

See also:

Mandeville Island Farms v. *Amer. Crystal Sugar Co.*, 334 U.S. 219, 222.

Ickes v. *Fox*, 300 U.S. 82, 96.

United States v. *New Wrinkle Co.*, 342 U.S. 371, 376.

Kingan & Co. v. *Smith*, 16 F. Supp. 549, 552.

With these decisions before it, it should have been clear to the United States Court of Appeals for the Seventh Circuit *that the District court,* in *dismissing, for lack of jurisdiction of the subject matter, defendant's compulsory counterclaims, accepted as true the averments of fact contained therein that the subject matter of the said counterclaims* (of which it denied jurisdiction) *was the same as the subject matter of the government's complaints.* It was apparent, therefore, that the District court had disclaimed jurisdiction of the subject matter of the government's complaints.

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* In the District court's order of October 27, 1954, a second ground for dismissal was given as failure to state a claim on which relief can be granted.

(16) As the Supreme Court said in the case of the *Mexican Central Railroad Company* v. *Pinkney,* 149 U.S. 194, 209:

> *"In the present case, when it was established by the facts stated in the plea in abatement, and admitted by the demurrer* thereto, that the plaintiff in error was never brought before the court by any proper or legal process, *the Circuit Court was without jurisdiction to proceed in the case."* (Emphasis added)

Paraphrasing the above decision to fit the present situation, the decision would read:

> In the instant case, when it was established by the averment in the counterclaim, and accepted as true by the court in dismissing the counterclaim, for lack of jurisdiction of the subject matter, that the said subject matter of the counterclaim was the same as that which forms the basis for the government's complaint, the District court was without jurisdiction to proceed in the case.

The foregoing facts appeared upon the face of the record docketed in the United States Court of Appeals for the Seventh Circuit *and evidenced the District court's disclaimer of jurisdiction of the subject matter of the government's complaint.* Controlling authorities hold that—

> "The operation of every judgment must depend upon the power of the court to render that judgment, or, in other words, upon its jurisdiction of the subject matter it has determined. * * * We are of opinion that the court had no jurisdiction of the subject matter, and that the whole proceeding is a nullity."
>
> *Hickey* v. *Stewart,* 3 How. 750, 762, 763.

See also:

Wilcox v. *Johnson,* 13 Pet. 509, 511.
Shriver v. *Lynn,* 2 How. 43, 58.
United States v. *Walker,* 109 U.S. 258, 266.
Windsor v. *McVeigh,* 93 U.S. 274, 282.
Earle v. *McVeigh,* 91 U.S. 503, 510.
Harris v. *Hardeman,* 55 U.S. 206, 209.

(17) In reply to defendant's counterclaim, including her compulsory counterclaim, which she filed as a part of her answer to the government's complaint involving the 1944 tax, the government set up two defenses: (1) that the court lacked jurisdiction of the subject matter of the counterclaim, and (2) that the counterclaim failed to state a claim upon which relief could be granted. *In other words the government was attempting to obtain by reason of its second defense, a judgment on the merits, while preventing the court, by reason of its first defense, from considering the merits upon which it expected the court to pass.* The United States District Court in its order of October 27, 1954, (Appendix pp. 4a and 5a) (R. 11703 p. 91) sustained the government's defensive motion for a preliminary determination of its defenses, and dismissed defendant's counterclaim, including her compulsory counterclaim, on the ground (1) that it lacked jurisdiction of the subject matter of the counterclaim, and (2) that the counterclaim failed to state a claim upon which relief can be granted. In the case of *Bell* v. *Hood,* 327 U.S. 678, 682, this Court stated:

> "Jurisdiction, therefore, is not defeated, as respondents seem to contend by the possibility that the averments might fail to state a cause of action on which petitioner could actually recover, for it is well settled that the failure to state a proper cause of action calls for a judgment on the merits, and not

for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law, and just as issues of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy."

(18) When the United States District Court denied its jurisdiction of the subject matter of defendant's compulsory counterclaim in its order of October 27, 1954 (Appendix pp. 4a and 5a), it denied its jurisdiction to pass upon the merits, *and the second ground given in the same order for dismissal of the counterclaim must be considered as invalid—the same as would be any other attempt to pass upon the merits by a court lacking jurisdiction of the subject matter.*

"Every act of a court beyond its jurisdiction is void."

United States v. *Walker,* 109 U.S. 258, 267.

III.

(19) In each of the cases referred to herein, the United States District Court refused to determine the legal rights of the parties when it dismissed defendant's affirmative defenses (Transcript of Proceedings pp. 68-75) (Appendix pp. 5a, 6a and 7a) (R. 11703 p. 6, Docket entry 10-31-55, and 11704 p. 33) and refused to consider the validity of the government's claim, or the legality of the tax upon which its claim is based. (Transcript of Proceedings pp. 72-73.) In the case of *Baker* v. *Baker, Eccles & Co.,* 242 U.S. 394, this Court said:

"A court of justice may not determine the personal rights of the parties without giving them a right to be heard; *such opportunity being a fundamental requisite of due process of law in judicial proceedings.*" (Emphasis added.)

See also *Hovey* v. *Elliott,* 167 U.S. 409, 413. It is clear that the District court after refusing to consider the legal rights of the parties could not proceed to judgment on the government's claim.

> "When the government elects to resort to the aid of the courts, it must abide by the legality of the tax." *Clinkenbeard* v. *United States,* 21 Wall, 65, 70.

See also *United States* v. *Bank of America,* 15 Fed. 730, 731.

(20) In each of the cases herein referred to, the *District court refused to determine the legality of the tax, both before and after payment,* thereby, in the same action, denying defendant "all remedy at law". In each case the District court ordered defendant's affirmative defenses, which raised the question of the legality of the tax, dismissed without trial or hearing, or opportunity to object (see District court's orders of October 31, 1955, Appendix pp. 5a, 6a and 7a) (R. 11703 p. 6, Docket entry 10-31-55; 11704 p. 33). And, in each case, the District court ordered defendant's compulsory counterclaim, which raised the same questions as to the legality of the tax, dismissed for lack of jurisdiction of the subject matter. (See District court's order of October 27, 1954, Appendix pp. 4a and 5a; R. 11703 p. 91, and its order of October 31, 1955, Appendix p. 7a; R. 11704 p. 33.) A money judgment entered thereafter in the said cases against defendant violated the "due process" clause of the Fifth Amendment to the Constitution of the United States of America. In the case of *Griffen* v. *Griffen,* 327 U.S. 220, 229, this Court declared:

> "Due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."

See also:

Washington ex rel. Oregon Nav. Co. v. *Fairchild,* 224 U.S. 510, 523.

United States v. *Walker,* 109 U.S. 258, 266.

Boyce's Exec. v. *Grundy,* 28 U.S. 210, 215.

"Compliance with constitutional mandates is an essential prerequisite to authority of a Federal court to enter a judgment, and jurisdiction initially had may be lost by failure to observe such a mandate."

Kenion v. *Gill,* 155 F. 2d 176, 179.

And in *Kingan & Co.* v. *Smith,* 16 F. Supp. 549, 552, the Court said:

"It is the duty of the court to accept as true the allegations of the bill of complaint for the purpose of considering the motion to dismiss. Such allegations are sufficient to justify the conclusion that complainant has no adequate remedy at law. If it is compelled to pay the taxes exacted under the act it is extremely doubtful whether it could maintain an action for their recovery even though the act should afterwards be adjudged invalid. A remedy at law, in order that it may be adequate, must be plain, complete and beyond doubt."

(21) Where due process had been denied defendant in the District court, she had a constitutional right of appeal as well as a statutory right of appeal to the United States Court of Appeals for the Seventh Circuit. In the case of *Ohio ex rel. Bryant* v. *Akron Met. Park Dist.,* 281 U. S. 74, 80, the Supreme Court said:

"The right of appeal is not essential to due process, *provided that due process has already been accorded in the tribunal of first instance.*" (Emphasis added)

A rule of the appellate court, applicable at its discretion, could not properly be invoked to annul appellant's constitutional and statutory right of appeal.

> "Rules of comity and convenience must give way to constitutional rights."
>
> *Oklahoma Nat. Gas Co.* v. *Russell*, 261 U.S. 290, 293.

(22) Inasmuch as the right of appeal from a judgment of a District court, which is subject to execution if no appeal is taken, is undeniably a statutory right, and where due process has been denied by the court of first instance, and the defendant had the constitutional right of appeal (*Ohio ex rel. Bryant* v. *Akron Met. Park Dist.*, 281 U.S. 74, 80) and where matter essential to the exercise of jurisdiction by the Court of Appeals did not appear upon the face of the record (*Galpin* v. *Page*, 18 Wall. 350, 371), for the United States Court of Appeals for the Seventh Circuit to require defendant-appellant to proceed with the costly printing of the record, preparatory to a hearing on the merits, was a denial of judicial relief by making prohibitive the conditions under which it was offered. In the case of the *Missouri Pac. R. Co.* v. *Tucker*, 230 U.S. 340, 349, the Supreme Court declared:

> "A law imposing such conditions upon the right to appeal for judicial relief as works an abandonment of the right rather than face the conditions upon which it is offered, or may be obtained, is also unconstitutional."

(23) The United States Court of Appeals for the Seventh Circuit, in proceeding to exercise its discretionary power to compel the printing of the record, for review on the merits, was in conflict with its own decision in the case of *Green* v. *Green*, 218 F. 2d 130, 136, in

which that court held *that lacking jurisdiction, the court could not exercise discretionary power,* citing a decision in the case of the *Eighth Regional War Labor Board* v. *Humboldt Oil Refining Co.,* 145 F. 2d 462, 464 (6th Cir.) in which the latter court said:

> "It is true that the nature of the appeal precludes a decision on the merits here, but the question of jurisdiction is always vital. A court must have jurisdiction as a prerequisite to the exercise of discretion."

IV.

(24) At the one and only trial ever held in this action (October 31, 1955) the District court, upon the very first mention of the complaint, refused to permit reference to the complaint and the other pleadings when it stated:

> "The facts of this complaint have all been settled. I have explained very carefully to you a number of times that the issue is payment or non-payment, or whether or not the tax is due. *We have settled the pleadings a long time ago.*" (Emphasis added.) (Transcript of Proceedings p. 99)

(25) The complaint and the other pleadinlgs, *which alone comprise these actions,* having been excluded by the District court from its consideration, they were not subject to review by the United States Court of Appeals on the merits. And, inasmuch as all other considerations in an action depend upon the complaint and the pleadings, their exclusion by the trial court at the only "trial" ever had in the actions precludes an appraisal of that performance as a "trial on the merits."

(26) The United States Court of Appeals for the Seventh Circuit, in indicating its intention to proceed to a hearing on the merits, sanctioned the foregoing depar-

ture from the usual course of judicial procedure by the District court.

(27) At the so-called trial, October 31, 1955, the District court limited the issues in the very beginning of the defense, before opportunity was provided defendant for calling her witnesses (Transcript of Proceedings p. 73), to two non-controversial, factual matters, arbitrarily selected by the court, when it stated:

> "If you did not make these returns, take the stand and show it. If you did make them, and then made some payments, produce your evidence, *and that is the only kind of evidence that I am going to listen to* * * * does the defendant proceed? If not, I will enter a judgment." (Emphasis added)

Whether or not defendant had filed the tax returns submitted in evidence (an act made compulsary by statute) and whether she had paid the tax (which, of course, she could not be required to pay if the tax is illegal as defendant asserts) were factual matters not placed in issue by the pleadings. All issues raised by the pleadings pertaining to the legal rights of the parties had been excluded, *and no legal question appears of record for an appellate court to review except the questions raised by appellant concerning the finality of the judgment appealed from and the jurisdiction of the District court to enter it.*

(28) Some of the points in appellant's statements of points relied upon on appeal were directed to erroneous and unfounded statements in the judgment and in the Findings and Conclusions, and to errors in the proceedings, *but when it became apparent from a reading of the Transcript of the proceedings in the District court that there had been no trial on the merits in that court, that fact replaced all other considerations,* and no question

going to the merits remained for the Court of Appeals to review.

Your petitioner submits that where both of the courts below have entered orders adversely affecting the rights of petitioner, after refusing to pass upon the substantial jurisdictional questions raised by your petitioner and supported by facts appearing upon the face of the record, plain for every one to see, the need for this Court's intervention is self-evident in order to put an end to this litigation.

CONCLUSION.

Wherefore petitioner earnestly prays that this petition for a writ of certiorari be granted, that this Court consider the jurisdictional questions raised; that the United States Court of Appeals for the Seventh Circuit be instructed (1) to vacate its decree dismissing petitioner's appeals for failure to proceed to a hearing on the merits; (2) to remand the actions to the United States District Court for the Northern District of Illinois, Eastern Division, with instructions to that court to vacate the invalid orders and judgments entered in these cases herein, and (3) inasmuch as the said District court has disclaimed jurisdiction of the subject matter of these actions to instruct the said District court to dismiss the actions for lack of jurisdiction.

Respectfully submitted,

IRENE B. WHETSTONE

Pro se

Dated: August 17, 1956, Chicago, Illinois

PROOF OF SERVICE.

SUPREME COURT OF THE UNITED STATES
October Term, 1956

AFFIDAVIT

State of Illinois }
County of Cook } *ss.*

Before me, the undersigned, a Notary Public, in and for the County of Cook and State of Illinois, personally appeared, Irene B. Whetstone, who being first duly sworn, deposes and says that on the 17th day of August, 1956, she served copies of petition for a writ of certiorari, as above entitled, upon the respondent, the United States of America:

(1) by leaving a copy thereof with a responsible employe in the offices of Robert Tieken, United States Attorney, Room 450 Federal Court House, Chicago, Illinois, and

(2) by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, 25, D. C.

IRENE B. WHETSTONE

Subscribed and sworn to before me
this 17 day of August, 1956

.....

Notary Public

ORDER FOR APPEARANCE.

SUPREME COURT OF THE UNITED STATES
October Term, 1956

IRENE B. WHETSTONE, *Petitioner,* v. UNITED STATES OF AMERICA, *Respondent.*	Petition for Writ of Certiorari To the United States Court of Appeals For the Seventh Circuit Filed August 20, 1956

To the Honorable John T. Fey, Clerk, Supreme Court of the United States:

Please enter my appearance *pro se* in the above entitled cause.

IRENE B. WHETSTONE, *Pro se*
9820 Vanderpoel Avenue,
Chicago 43, Illinois.

APPENDIX.

The following orders which were entered by the United States District Court for the Northern District of Illinois, Eastern Division, in the action now on appeal as Docket No. 11703, are printed below for the convenience of this Court.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
v.
IRENE B. WHETSTONE,
Defendant.
No. 51 C 1017

JUDGMENT.

The above-entitled action came on for hearing before this Court, the plaintiff appearing by its attorney, the United States Attorney, and the defendant apearing *pro se*, and evidence having been received and testimony having been heard, and the Court having made its Findings of Fact and Conclusions of Law, and being fully apprised in the premises.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff, United States of America, do have and recover from the defendant, Irene B. Whetstone, the sum of $2283.04, together with interest from this date until the judgment is paid, as provided by law, and plaintiff's costs.

ENTER:

J. S. PERRY
Judge.

Dated: December 7, 1955

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

IRENE B. WHETSTONE,
Plaintiff,
v.
UNITED STATES OF AMERICA,
Defendant.
No. 51 C 1017

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for hearing before this Court on October 31, 1955, the plaintiff appearing by R. Tieken, United States Attorney, and Donald S. Lowitz, Assistant United States Attorney, and the defendant, Irene B. Whetstone, appearing *pro se*. Evidence having been received and testimony having been heard, the Court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff was and now is a corporation sovereign and body politic.

2. This action was authorized by the Commissioner of Internal Revenue of the United States Treasury Department, and was brought under the direction of the Attorney General of the United States.

3. The defendant does reside and at all times material herein was a resident of the City of Chicago, County of Cook, State of Illinois.

4. Plaintiff's claim is for the recovery of an assessment for income taxes due and owing by the defendant for the taxable year 1944, together with interest as provided by law, and costs.

5. On July 14, 1945, the Commissioner of Internal Revenue made an assessment against the defendant for 1944 income taxes in the amount of $1,727.03, and said assessment was received in the Chicago office of the Internal Revenue Service on July 18, 1945.

6. Notice of the assessment was sent to the defendant, Irene B. Whetstone, on July 28, 1945.

7. The defendant-taxpayer made a payment of $338.00 on account of her estimated income tax liability for the taxable year 1944, which payment was applied as an abatement to the assessment of $1,727.03 for the defendant's 1944 tax liability, leaving a balance of tax due of $1,389.03.

8. No part of the $1,389.03 balance due on the assessment of 1944 income tax has been paid.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter.

2. The assessment made by the Commissioner of Internal Revenue on July 14, 1945 in the amount of $1,727.03 is *prima facie* evidence of the amount due the plaintiff from the defendant, Irene B. Whetstone.

3. The presumption of correctness of the assessment made by the Commissioner of Internal Revenue has not been overcome by the defendant.

4. The $338.00 paid by the defendant on account of her estimated income tax liability for the taxable year 1944 has been properly applied as an abatement to the assessment of $1,727.03 for income tax due for the taxable year 1944, leaving a balance of tax due and owing by the defendant of $1,389.03.

5. Plaintiff is entitled to a judgment in the amount of $2283.04, being the balance of assessed taxes of $1,389.03, plus accrued statutory interest from March 15, 1945, to December 7, 1955, in the amount of $894.01 together with interest until the judgment is satisfied, as provided by law, and with plaintiff's costs.

J. S. PERRY,
Judge.

Dated: Dec. 7, 1955.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA, *Plaintiff,*
vs.
IRENE B. WHETSTONE, *Defendant.*
No. 51 C 1017

ORDER

This cause coming on upon motion of the plaintiff for a preliminary determination of the following defenses raised in plaintiff's Amended and Supplemental Reply to Counterclaim of defendant—

1. This Court does not have jurisdiction over the subject matter of defendant's amended counterclaim.
2. The defendant's amended counterclaim fails to state a claim upon which relief can be granted.

The Court having considered the various briefs of the parties and being fully advised does hereby grant said motion.

The Court further considering said plaintiff's Amended and Supplemental Reply to Counterclaim of Defendant—the Court finds it does not have jurisdiction of defend-

ant's amended counterclaim and that the defendant's counterclaim fails to state a claim upon which this Court can grant relief.

It is, therefore, ORDERED that defendant's said counterclaim be and the same is hereby stricken.

ENTER:

J. S. PERRY,
Judge.

Oct. 27, 1954

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Monday, October 31, 1955

Present THE HONORABLE J. SAM PERRY

UNITED STATES OF AMERICA
vs.
IRENE B. WHETSTONE
} No. 51 C 1017
PERRY *J.*

This cause this day being called for trial comes the United States by the United States Attorney comes also the defendant in her own proper person and on motion of the Government by the United States Attorney it is

ORDERED that Cause No. 53 C 1553 be and the same hereby is consolidated with this cause for trial and the issues being joined the trial proceeds and at the conclusion of the Government's case on motion of the Government by the United States Attorney it is

FURTHER ORDERED that the defendant's affirmative defenses be and the same hereby are dismissed, the trial proceeds and evidence is heard for the defendant and the defendant concludes her case and it is

ORDERED that counsel for the Government shall present proposed findings of fact, conclusions of law and judgment order within ten days from this date and that the defendant shall file objections, if any, ten days thereafter.

The following Orders which were entered by the United States District Court for the Northern District of Illinois, Eastern Division, in the action now on appeal as Docket No. 11704, are printed below for the convenience of this Court.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

THE UNITED STATES OF AMERICA,
Plaintiff,
v.
IRENE B. WHETSTONE,
Defendant.
No. 53 C 1553

JUDGMENT

The above-entitled action came or for hearing before this Court, the plaintiff appearing by its attorney, the United States Attorney, and the defendant appearing *pro se,* and evidence having been received and testimony having been heard, and the Court having made its Findings of fact and Conclusions of Law, and being fully apprised in the premises,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff, United States of America, do have and recover from the defendant, Irene B. Whetstone, the sum of $990.31, together with interest from this date until the judgment is paid, as provided by law, and plaintiff's costs.

ENTER:

J. S. PERRY,
Judge.

Dated: December 7, 1955

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Monday, October 31, 1955

Present HONORABLE J. SAM PERRY

UNITED STATES OF AMERICA,
v.
IRENE B. WHETSTONE.
} No. 53 C 1553
PERRY *J.*

This cause this day being called for trial comes the United States by the United States Attorney comes also the defendant in her own proper person and on motion of the Government by the United States Attorney it is

ORDERED that this cause be and the same hereby is consolidated with Cause No. 51 C 1017 to proceed under said number and the issues being joined the trial proceeds and at the conclusion of the Government's case on motion of the Government by the United States Attorney it is

FURTHER ORDERED that the defendant's counterclaim and all of the defendant affirmative defenses be and the same hereby are dismissed, the trial proceeds and evidence is heard for the defendant and the defendant concludes her case and it is

FURTHER ORDERED that counsel for the Government shall present proposed findings of fact, conclusions of law and judgment order within ten days from this date and that the defendant shall file her objections, if any, ten days thereafter.

The following orders were entered by the United States Court of Appeals for the Seventh Circuit in the actions docketed in that court as 11703 and 11704. Identical orders were entered in both cases.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
April 10, 1956

Before HON. F. RYAN DUFFY, *Chief Judge*

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 11703 *vs.*
IRENE B. WHETSTONE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the motion of Irene B. Whetstone, defendant-appellant, filed on March 12, 1956, for a preliminary determination as to the jurisdiction of this Court to review the judgment of the District Court entered December 7, 1955, and of the counter-motion and answer of plaintiff-appellee and also, of the defendant-appellant's answer thereto, together with the memoranda of law filed by the parties respectively,

IT IS ORDERED, that the motion of defendant-appellant be, and the same is hereby denied in all respects, without prejudice to the right of defendant-appellant to renew said motion on the hearing of the appeal herein on the merits.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
April 17, 1956

Before HON. F. RYAN DUFFY, *Chief Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. IRENE B. WHETSTONE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 11703	

It is ordered that the Motion of Defendant-Appellant for reconsideration of this Court's Order of April 10, 1956 and for a Ruling essential to the further prosecution of this appeal, be and the same is hereby Denied.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
August 2, 1956

Before

WALTER C. LINDLEY, *Circuit Judge*

HON. ELMER J. SCHNACKENBERG, *Circuit Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. IRENE B. WHETSTONE, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 17703-4	

Upon the motions of plaintiff-appellee to dismiss the above entitled appeals, and defendant-appellant's response thereto, inasmuch as the appellant has not complied with Rule 14 and the various subsections thereof,

included in the Rules of this Court effective January 1, 1954, by the provisions of which these appeals are governed,

IT IS ORDERED that each appeal be, and the same is hereby, dismissed.

Paragraph 14, appearing on page 4 of defendant's Amended Counterclaim. (R. 11703 p. 67.)

> "Notations directing attention to claims for refund (1944 and 1943 tax levies) appear on income report and payment check respectively, made by claimant, under protest, for the year 1944 and these notations bear witness to the fact that such claims for recovery arise out of the same transaction with respect to which an action has been instituted against defendant, claimant herein, by Otto Kerner, Jr., United States Attorney, in the name of the United States of America, No. 51 C 1017 (N.D. Ill.) the original action herein. Each one of the foregoing claims represents a separable claim arising out of the same transaction and presenting the same subject matter as that which forms the basis for the government's original complaint herein. All of the foregoing claims raise the same issue as to the legality of the tax raised by defendant in her defense to the instant action."

Paragraph 12, appearing on page 4 of defendant's Compulsory Counterclaim. (R. 11704 p. 22.)

> "Defendant asserts that the above claim, presented herein, arises out of the same transaction, and presents the same subject matter as that which forms the basis for the government's complaint herein. It raises the same issues as to the legality of the tax as that raised by defendant in her defense to the instant action, and, if the court has jurisdiction of the government's complaint, such jurisdiction extends

to this compulsory counterclaim. Defendant also asserts that statutory authority for adjudication by a Federal District Court of the above claim is present in Title 28 U.S.C., Section 1346, and statutory authority is also provided for the filing of such a claim, denominated as a compulsory counterclaim by Rule 13(a) of the Rules of Civil Procedure, (enacted into law pursuant to Act of June 19, 1934, CH 651) and this counterclaim, denominated as such, is referred to by defendant, claimant herein, on page 2 of her Answer herewith to the government's complaint herein."

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 335

IRENE B. WHETSTONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves two identical suits in which the Government, in the District Court for the Northern District of Illinois, sought to reduce to judgment income taxes owed by taxpayer for the years 1944 and 1946. Taxpayer filed similar answers in each case, denying material allegations of the Government's complaints and setting forth affirmative defenses that the income tax was unconstitutional because it was utilized to reimburse the Treasury of the United States for unconstitutional expenditures, e. g., to finance wars between other nations, promote foreign aid, construct overseas military defenses, etc. Taxpayer also filed a counterclaim in each case, seeking recovery of taxes which she had paid and which she asserted were unconstitutional for the same reasons.

The District Court granted the Government's motion to dismiss the affirmative defenses and counter-

claims on the grounds that it lacked jurisdiction over the issues presented therein and that they failed to state claims upon which relief could be granted. Accordingly, the District Court entered judgment for the Government for the balance of taxes owed by taxpayer.

Taxpayer appealed to the Court of Appeals for the Seventh Circuit. She also filed motions in the Court of Appeals for a preliminary determination as to the jurisdiction of that court to review the judgments of the District Court, contending (despite the fact that taxpayer was the appellant) that there was no final judgment or order of the District Court and that the District Court had no jurisdiction over the subject-matter. The Court of Appeals denied these motions, without prejudice to taxpayer's right to renew them at the hearing of the appeals on the merits. Upon failure of taxpayer to perfect her appeals by filing printed records and briefs, the Court of Appeals, upon the Government's motion and pursuant to its Rules, dismissed the appeals. Taxpayer then petitioned this Court for a writ of certiorari.

It is submitted that the orders dismissing the appeals and denying taxpayer's motions for preliminary determination of the jurisdictional questions were clearly within the discretion of the Court of Appeals and that the petition for certiorari, on its face, does not present any question which merits review by this Court.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

SEPTEMBER, 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

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SEP 22 1956

JOHN T. FEY, Clerk

No. 335

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

IRENE B. WHETSTONE,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MEMORANDUM FOR PETITIONER IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

IRENE B. WHETSTONE
Pro Se
9820 Vanderpoel Ave.
Chicago 43, Illinois

The Scheffer Press, Inc.—ANdover 3-6850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956.

No. 335

IRENE B. WHETSTONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM FOR PETITIONER IN REPLY TO MEMORANDUM FOR THE UNITED STATES IN OPPOSITION.

Petitioner, in reply to the government's (respondent's) memorandum brief in opposition to her petition for writ of certiorari, as above entitled, directs this Court's attention to the fact that the government avoids the real issues presented by said petition as stated in the first paragraph of page 3 thereof, under the heading "Jurisdiction", wherein petitioner specifically indicates that the judgments, the finality and validity of which petitioner seeks a determination by this Court, are those entered by the United States District Court for the Northern District of Illinois, Eastern Division, on December 7, 1955. (See Appendix of said petition, pages 1(a) and 6(a) thereof.)

Petitioner calls attention to the fact that the government's contention (final paragraph of its memorandum) concerning the orders entered by the United States Court of Appeals for the Seventh Circuit, were such contention supportable, would not be controlling of the issues here on petition, because under Title 28 U.S.C., Section 1254 and subsection 1254(1), the right to petition for writ of certiorari and the right to have it considered is in no way affected by the action taken in the United States Court of Appeals where, as in these cases, the petition for certiorari was docketed with the Clerk of this Court while the appeals were still "in" the said United States Court of Appeals, and before the due date for mandate to issue.

In fact, it is obvious that the entire purpose of the said petition for writ of certiorari *is to obtain from this Court —the court of last resort—a determination of the fundamental jurisdictional issues, apparent on the face of the record, which both of the courts below refused to pass upon.*

The government's memorandum errs in its statement on page 1, and should be corrected to show that taxpayer filed similar answers, in each case involved herein, denying material allegations of the government's complaints and setting forth affirmative defenses *which among other charges* asserted that *"the revenue laws which provided for the levy of the tax were neither 'necessary nor proper' legislation * * * because they were enacted and employed to provide money for carrying into execution projects for which there is no power vested by the Constitution in the United States government"* * * * and to reimburse the Treasury

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Note: Contrary to the implication conveyed by the government in its memorandum, page 2, either party may raise jurisdictional issues on appeal. See Rule 13(b) of Rules of the United States Court of Appeals for the Seventh Circuit, printed on page 10 of Petition for Certiorari.

for such invalid withdrawals (R. 11704 pp. 9-30) (R. 11703 pp. 13-51 and pp. 64-77). However, since, at the only trial had in these actions, the pleadings, including the complaints and answers, were excluded from its consideration by the said District Court (Transcript of Proceedings, page 99) they are not subject to review by this Court. They are referred to in the petition only for the purpose of showing that material essential to a hearing on the merits was excluded by the trial court, and that the said District Court, in dismissing defendant's pleadings, denied her "all remedy at law" (Petition, pages 32-33), and disclaimed its jurisdiction of the subject matter of the action (Petition, pages 27-30).

This Court's attention is directed to the fact that the government's memorandum brief in opposition submits as its concluding statement that "the petition for certiorari, on its face, does not present any question which merits review by this Court." Petitioner submits that the petition for certiorari makes it clear that a review by this Court would not be necessary because lack of finality and validity of the judgments in question is apparent upon the face of the records.

This Court's attention is directed to the fact that in its opposing memorandum brief the government avoids the pertinent issues raised as to lack of finality and validity of the judgments rendered against your petitioner by the said District Court, which lack is apparent on the face of the records; and, *repeating its performance in the courts below, it seeks to induce this Court to desist from passing upon these substantial jurisdictional questions raised by your petitioner, its obvious purpose being to benefit thereby from the invalid judgments rendered in its favor.*

It should be apparent to this Court that the government's position is untenable and is not one which this Court can properly sustain.

It is plain that this Court has a moral obligation to pass upon the jurisdictional issues presented by petitioner and if it is the practice of this Court to make such determination without granting the petition for writ of certiorari, where lack of jurisdiction is self-evident, as in these cases, petitioner prays that such determination be made pursuant to the practices of this Court with or without the granting of said petition.

Respectfully submitted,

IRENE B. WHETSTONE, *pro se*
9820 Vanderpoel Avenue
Chicago 43, Illinois

September 21, 1956

PROOF OF SERVICE.

SUPREME COURT OF THE UNITED STATES
October Term, 1956
No. 335

Irene B. Whetstone, *Petitioner,*

v.

United States of America, *Respondent.*

AFFIDAVIT

State of Illinois }
County of Cook } ss.

Before me, the undersigned, a Notary Public, in and for the County of Cook and State of Illinois, personally appeared Irene B. Whetstone, who, being first duly sworn, deposes and says that on the 21st day of September, 1956, she served copies of Memorandum for Petitioner in Reply to Memorandum for the United States in Opposition to petition for writ of certiorari, in the above entitled case, upon the respondent, the United States of America:

(1) by mailing a copy thereof in a duly addressed envelope, postage prepaid, to Robert Tieken, United States Attorney, Room 450 Federal Court House, Chicago, Illinois, and

(2) by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington, 25, D.C.

IRENE B. WHETSTONE

Subscribed and sworn to before me this 21st day of September, 1956.

G. Webeck
[Seal] Notary Public